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No. 94-1334

IN THE

Supreme Court of the United States

October Term, 1994

GUS ALEX,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

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PETITIONER'S REPLY MEMORANDUM

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14pp

TABLE OF CONTENTS

Table of Authorities ii

Petitioner's Reply Memorandum 1

TABLE OF AUTHORITIES

CASES

Feinstein v. Resolution Trust Corp., 942 F.2d 34 (1st Cir. 1991) 4

In re Winship, 397 U.S. 358 (1970) 2

United States v. Boyd, No. 95-1050, 1995 U.S. App. LEXIS 10468 (7th Cir. May 10, 1995) 7

United States v. Boyd, 833 F. Supp. 1277, 1362-1364 (N.D. Ill. 1993) 6

United States v. Canino, 949 F.2d 928 (7th Cir. 1991), *cert. denied*, *United States v. Flynn*, 503 U.S. 996, and *cert. denied*, 504 U.S. 910 (1992) 3

United States v. Edmonds, Nos. 93-1890, 93-1914, 93-1920, 93-1947, 1995 U.S. App. LEXIS 8850 (3d Cir. April 18, 1995) 2, 3

United States v. Killip, 819 F.2d 1542 (10th Cir.), *cert. denied sub nom., Marr v. United States*, 484 U.S. 865 (1987) 5

United States v. Rastelli, 870 F.2d 822 (2d Cir.), *cert. denied*, 493 U.S. 982 (1989) 5

United States v. Ruggiero, 726 F.2d 913 (2d Cir.), *cert. denied sub nom., Rabito v. United States*, 469 U.S. 831 (1984) 4

United States v. Sanders, 929 F.2d 1466 (10th Cir.), *cert. denied*, 502 U.S. 846 (1991) 5

United States v. Winter, 663 F.2d 1120 (1st Cir. 1981), *cert. denied*, 460 U.S. 1011 (1983) 4, 5

United States ex rel. Ashford v. Director, Illinois Department of Corrections, 871 F.2d 680 (7th Cir. 1989) 7

CONSTITUTIONAL PROVISIONS

U.S. Constitution Amendment V 1

U.S. Constitution Amendment VI 6, 8

STATUTES

18 U.S.C. § 848 2

18 U.S.C. § 1961(5) 2

18 U.S.C. § 1962(c) 2, 4

18 U.S.C. § 1962(d) 2

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PETITIONER'S REPLY MEMORANDUM

Petitioner Gus Alex respectfully submits the following points in reply to the Brief for the United States in Opposition ("Gov't Br.").

1. In the petition, we argue that the verdict against Mr. Alex violates the Fifth Amendment Due Process Clause and the Sixth Amendment because the district court refused Alex's request that the jury be instructed that all twelve jurors had to agree

unanimously on which two predicate acts Alex agreed some member of the conspiracy would commit. (Petition at 12-14.)

In response, while the government concedes that a "pattern of racketeering activity," as defined in 18 U.S.C. § 1961(5), is an element of a RICO offense under both Sections 1962(c) and (d) (Gov't Br. at 10), the government nonetheless argues that neither Section 1962(c) nor (d) requires unanimous jury agreement on the predicate acts. The government asserts that the predicate acts are merely the means by which the RICO crime is committed rather than an element of the crime (Gov't Br. at 10-12), but cites no authority for this proposition. Neither this Court nor any other has analyzed the unanimity issue in the context of the RICO statute. In a different but instructive context, however, the Third Circuit recently rejected the government's argument.

In *United States v. Edmonds*, Nos. 93-1890, 93-1914, 93-1920, 93-1947, 1995 U.S. App. LEXIS 8850, at *3 (3d Cir. April 18, 1995), the Third Circuit reversed a conviction under 18 U.S.C. § 848 (the "CCE statute") where the district court refused to instruct the jury that it must agree unanimously which of the alleged violations constituted the "continuing series of violations." The court noted that the term "continuing" in the CCE statute means that the three violations must be related and held that the "required underlying criminal acts, including their 'relatedness,' are 'facts necessary to constitute the crime' -- not merely immaterial means -- and therefore must be proven individually." *17 (citing *In re Winship*, 397 U.S. 358, 364 (1970)). The court said (*16):

> We do not know that the jury unanimously agreed that Edmonds participated in a single set of events that met all of the elements of the statutory definition. Because no event can meet the statutory criteria unless the distribution involved was related to two or more other distributions, the district court's charge leaves us without the requisite assurance that no juror had a reasonable doubt concerning Edmonds' guilt of the

> CCE charge. A juror may have had a reasonable doubt about the "relatedness" of one or more of the events that his or her colleagues thought constituted a series of three related drug offenses.

The court noted its disagreement with the Seventh Circuit's holding in *United States v. Canino*, 949 F.2d 928, 947-48 (7th Cir. 1991), *cert. denied*, *United States v. Flynn*, 503 U.S. 996, and *cert. denied*, 504 U.S. 910 (1992). The court observed that the Seventh Circuit has held that (*18 and *19) "the predicate offenses making up a 'continuous series' of violations and their 'relatedness,' . . . are immaterial 'means' and not material elements of the crime requiring specific juror agreement." As to its disagreement with the Seventh Circuit, the court stated (*19):

> The relevant point is not, as the Seventh Circuit views it, whether a person who commits three related drug violations with the requisite sized group on May 12th, 13th and 14th of a given year is as culpable as if he or she commits similar violations with the requisite sized group on June 12th, 13th, and 14th. The relevant point is that a person cannot be held criminally responsible if half of the jury believes the defendant committed the conduct described by the statute on May 12th, 13, and 14th, but not in June, and the other half believes the defendant committed the conduct described by the statute on June 12th, 13th, and 14th, but not in May. Cf. Schad. 501 U.S. at 651 (Scalia, J., concurring) (stating that "moral equivalence" would not justify upholding an assault conviction where a portion of the jury may have believed the defendant assaulted X on Tuesday, while the other half may have believed the defendant assaulted Y on Wednesday).

The rationale of *Edmonds* applies with equal force to RICO's pattern of racketeering activity requirement. As the government notes, to constitute a "pattern of racketeering activity"

the predicate acts must be "related" and "amount to or pose a threat of continued criminal activity." (Gov't Br. at 10.) Without unanimity as to the predicate acts, it is impossible to conclude that no juror had a reasonable doubt as to the relatedness of one or more of the predicate acts or whether the specific predicate acts indicated the threat of continued criminal activity. The circumstances under which a defendant is entitled to a unanimity instruction is an issue of fundamental, constitutional significance, and one which has divided the courts of appeal in non-RICO cases. The Court should grant the petition to provide the necessary amplification and guidance on this issue.

2. We ask the Court to resolve a conflict among the circuits as to whether a conspiracy to violate Section 1962(c) requires proof that the defendant agreed personally to commit at least two predicate acts. (Petition at 16-17.) The government acknowledges that the circuit courts are divided on this question. The government nevertheless urges the Court not to resolve the conflict and speculates that two of the circuits holding that the defendent must agree personally to commit two racketeering acts, the First and Second, would likely reconsider the decisions in *United States v. Winter*, 663 F.2d 1120 (1st Cir. 1981), *cert. denied*, 460 U.S. 1011 (1983) and *United States v. Ruggiero*, 726 F.2d 913 (2d Cir.), *cert. denied sub nom., Rabito v. United States*, 469 U.S. 831 (1984), if presented with the same issue today. (Gov't Br. at 13-18.)

The government's acknowledgement that the circuits are divided on the issue is sufficient cause for the Court to grant the petition. (Gov't Br. at 14.) The government's speculation that the First and Second Circuits would "reconsider" their prior decisions is baseless, particularly in light of subsequent decisions in both circuits reaffirming that the defendant must agree to commit personally two acts of racketeering. *Feinstein v. Resolution Trust*

Corp., 942 F.2d 34, 41 (1st Cir. 1991); *United States v. Rastelli*, 870 F.2d 822, 828 (2d Cir.), *cert. denied*, 493 U.S. 982 (1989).[1]

The government also suggests that the Court need not grant the petition on this issue because the Court has refused to consider the issue in the past. (Gov't Br. at 17 n.8.) That fact militates for rather than against review by the Court now. This issue continues to arise, and should be resolved because of the nebulous nature of RICO conspiracy law and charging theories used by prosecutors, where defendants such as Mr. Alex are charged with RICO conspiracy but not a substantive RICO offense.

The government's primary argument is that the rule we urge, one which would require agreement to commit two predicate racketeering acts personally, "impose[s] a more onerous standard under RICO than applies in conspiracy law generally." (Gov't Br. at 13.) To support its argument, the government selectively recites *one* element of so-called "general" conspiracy law, an agreement by the conspirator. (*Id.*) Another basic principle of conspiracy law, ignored by the government, is the overt act requirement. The RICO conspiracy statute does not require an overt act and for that reason exposes defendants to a conspiracy charge for nothing more than a conversation construed as an "agreement." As the First Circuit observed, Congress intended the rule that the defendant personally agree to commit two racketeering acts to "provid[e] sufficient protection to those who might otherwise be convicted through guilt by association." *Winter*, 663 F.2d at 1136.

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[1]The government also argues that "the Tenth Circuit has [not] definitively resolved the issue." (Gov't Br. at 15 n.7.) The government's tenuous argument, which the Court should reject, is contradicted by the fact that the Tenth Circuit applied the rule that the defendant must agree to commit personally at least two predicate acts and used it to reverse convictions in both *United States v. Killip*, 819 F.2d 1542,1547-48 (10th Cir.), *cert. denied sub nom., Marr v. United States*, 484 U.S. 865 (1987), and *United States v. Sanders*, 929 F.2d 1466, 1473 (10th Cir.), *cert. denied*, 502 U.S. 846 (1991).

3. We ask this Court to resolve the question as to whether, in light of the facts here, Alex's Sixth Amendment right of confrontation should override Patrick's claim of attorney-client privilege. (Petition at 17-19.) In response, the government asserts that we do not contest the finding of privilege by the district court and Court of Appeals; that there is no reason for this Court to decide this issue because Patrick was extensively cross-examined; and that the Court of Appeals correctly concluded that Patrick's inconsistent statements as reflected in the so-called Mejia documents about the charges in the indictment "would have added too little to the picture to warrant abrogating the client-privilege." (Gov't Br. at 19-20.) The government is wrong on all scores.

Contrary to the government's argument, we directly challenge the finding that the Mejia documents were within the scope of Patrick's attorney-client privilege. The fact that, as the government points out, the district court *may* have looked at each document does not mean that the government established, as the law requires, each element of the privilege as to each document. (Petition at 18.)

Even if the Mejia documents are privileged, Alex's Sixth Amendment right of confrontation nevertheless overrides Patrick's attorney-client privilege. The Mejia documents contain assertions by Patrick of FBI coercion and therefore impeach Patrick's credibility.[2] *See United States v. Boyd*, 833 F. Supp. 1277, 1362-

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[2]In a case like this one, where evidence critical to the prosecution came from a witness who translated a taped conversation, the Seventh Circuit recently recognized the potentially devastating impact of cross-examination that impeaches the translating witness when it affirmed the reversal of a conviction and grant of a new trial. The court (speaking through the same Judge who wrote the Alex opinion) said:

> Although the testimony of the six prisoner witnesses for the prosecution was corroborated, had their testimony been disbelieved the defendants would have had to be acquitted on most counts. It is true that the government introduced a number of taped

1364 (N.D. Ill. 1993) (court held that cross-examination related to the witnesses' "conduct subsequent to becoming cooperating witnesses" was not "merely cumulative").

The Mejia documents also contain material which contradicts Patrick's testimony on matters directly related to the indictment charges. The Mejia documents impeach Patrick's testimony that he (Patrick) received certain extortion proceeds that he testified he gave to Alex. *See United States ex rel. Ashford v. Director, Illinois Department of Corrections*, 871 F.2d 680, 683 (7th Cir. 1989) (court recognized importance of the right of

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> conversations that were highly incriminating of the defendants, but these tapes were translated by witness Harris and their meaning was thus conveyed to the jury through his testimony. If the jury hadn't believed him, it would not have been impressed by the tapes. And without the tapes, the testimony of the prisoner witnesses was essential on most of the counts of which the defendants were convicted.
>
> * * *
>
> The reason the concealed evidence might well have made a difference was that the witnesses had claimed to have "seen the light" when, having been arrested and sentenced or threatened with severe punishment for their activities as El Rukns, they had decided to cooperate with the government. That had been in 1985. Six years later they were still dealing drugs, stealing, smuggling, violating jail rules, and lying on the stand. Had these things been known to the jury it might have doubted their testimony that they had "seen the light." Knowing that they were lying under oath about their using and dealing in drugs, the jury might reasonably have supposed that they were lying about the criminal activities of the defendants as well.

United States v. Boyd, No. 95-1050, 1995 U.S. App. LEXIS 10468, at *18-20 (7th Cir. May 10, 1995). If the court substitutes "Patrick" for "prisoner witnesses" and "Harris," the Seventh Circuit has articulated in a compelling fashion the precise argument advanced by Mr. Alex. The divergent positions taken by the Seventh Circuit in the two cases reinforces the concern raised by Mr. Alex in his petition for rehearing in the court below - result-oriented decision making.

confrontation as to "testimony on direct [as distinguished from collateral] matters."). The Sixth Amendment entitles Mr. Alex to put his case to a jury having the benefit of all relevant information.

4. In the petition, we argue that this Court should grant the petition to consider whether the Court of Appeals erred in affirming the upward departure imposed by the district court on two alternative grounds. We argue that (a) the Court of Appeals improperly affirmed on a ground that the district court implicitly rejected as a basis for an upward departure and (b) the alternative ground relied upon by the district court is an improper basis for a departure because the grouping analysis of the RICO statute already enhances the penalty for organized crime membership. (Petition at 19-21.)

As to the first ground for departure, threats *to* (not *against* as the government claims) the victims' family members, the government incorrectly asserts that "the court simply rejected petitioner's argument that a departure was unjustified unless the threats against family members were communicated directly to them." (Gov't Br. at 21.) Apparently, the government is attempting to show that the Court of Appeals affirmed on the ground used by the district court -- threats to the family members -- even though there was no evidence of such threats. But the government's assertion is belied by the opinion of the Court of Appeals, which states (Pet. App. 8a):

> ...[T]here is no indication that the victims of the defendant's extortions told their families about the threats. But it does not matter. The extortion victims themselves, such as Moss, were also threatened with physical injury; the mention of their families merely magnified the threats.

Taken in context, it is clear from the opinion that the Court of Appeals agreed with Mr. Alex that no record support existed for the ground for departure relied upon by the district court -- threats

to family members -- and instead affirmed on a ground rejected by the district court.

The government misstates our argument on the organized crime issue. According to the government, we claim that the law prohibits an upward departure for involvement in organized crime because ". . .Guidelines § 2E1.1 provides that the offense level for a RICO offense is the higher of 19 or the offense level applicable to underlying racketeering activity. . . ." (Gov't Br. at 22.) Contrary to the government's assertion, we do not argue that the RICO base offense level already accounts for organized crime membership. Instead, we argue that the courts below erred because the grouping analysis, which enhances the offense level for such things as being a leader of a criminal enterprise having more than four members, already accounts for organized crime membership. For this reason, an upward departure for organized crime involvement is improper.

5. In the petition, we argue that the district court erred when it struck the affidavits of Mr. Alex's trial lawyers and when it refused to hold a pre-trial competency hearing. In response, the government asserts that "none of the experts found [Mr. Alex] to be incompetent" and that "two experts found that petitioner was competent to stand trial." (Gov't Br. at 23.) The government's response misstates the record and evades the real issue, which is that the district court improperly struck the affidavits of Mr. Alex's trial lawyers and failed to hold a competency hearing in the face of evidence raising a reasonable question as to Mr. Alex's competence. The government's argument is misleading in two significant respects.

First, two experts did not find Mr. Alex competent. One expert found Mr. Alex competent; another said "that there is insufficient data to conclude that he is unable to understand the nature and consequence of the proceedings against him or unable to assist properly in his defense." (App. 128.) Second, the fact that, as the government asserts, the affidavits conflicted with *some*

of the medical evidence does not justify striking the affidavits. The affidavits were consistent with the medical evidence calling Mr. Alex's competency into question, and under the law the courts below erred by striking the affidavits and failing to hold a hearing.

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